ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION III

CACR 07-472

FEBRUARY 6, 2008

SAMANTHA ANNE MITCHELL APPELLANT	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. CR-05-388-2]
V.	HONORABLE DAVID S. CLINGER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Samantha Anne Mitchell appeals her conviction for the second-degree murder of a four-month-old infant (DS), who was found unresponsive in an infant swing at her in-home daycare. She was tried before a jury in Benton County Circuit Court. Appellant's arguments for reversal are that: (1) there is insufficient evidence to support her conviction; (2) the trial court abused its discretion in allowing witnesses to refer to the constellation of injuries as "shaken baby syndrome" or synonymous terms; and (3) the trial court abused its discretion in permitting a State's witness to use a video demonstration. We have considered her arguments but find no reversible error in the trial court's rulings. Therefore, we affirm.

First, appellant contends that there is insufficient evidence to support her conviction because the State failed to prove the requisite mens rea. We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *See Tubbs v. State*, 370 Ark. 47, __ S.W.3d __ (2007). In reviewing a challenge to the sufficiency of the evidence, we determine whether the verdict is supported by substantial evidence, direct or circumstantial. *See id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *See id.* This court views the evidence in the light most favorable to the verdict, and only evidence supporting the verdict will be considered. *See id.*

The jury was instructed to determine whether appellant committed second-degree murder by finding whether she knowingly caused the death of DS under circumstances manifesting extreme indifference to the value of human life. *See* Ark. Code Ann. § 5-10-103(a)(1) (Repl. 2006). A person acts knowingly with respect to her conduct or the attendant circumstances when she is aware that her conduct is of that nature or that the attendant circumstances exist, and she acts knowingly with respect to the result of her conduct when she is aware that it is practically certain that her conduct will cause the result. Ark. Code Ann. § 5-2-202(2)(A)&(B) (Repl. 2006). The jury was also instructed on the lesser-included offenses of negligent homicide and manslaughter.

A person's intent or state of mind at the time of the offense is seldom apparent. *Harshaw v. State*, 348 Ark. 62, 71 S.W.3d 548 (2002). However, a person is presumed to intend the natural and probable consequences of his actions. *Coggin v. State*, 356 Ark. 424,

156 S.W.3d 712 (2004). The weighing of evidence and witness credibility are matters left solely to the discretion of the jury. *Jones v. State*, 269 Ark. 119, 598 S.W.2d 748 (1980).

Appellant argues on appeal that although a lesser crime may have been sustained by the proof, manslaughter or negligent homicide, the evidence does not rise to the level of knowingly causing this child's death. Appellant asserts that she cared for children routinely in her home, including her own, and that there was no evidence she ever harmed this child or any other on any previous occasion, nor was there evidence of external injury to DS. Lastly, she points to the absence of any attempt on her part to cover up or to give improbable explanations of what happened to DS.

The evidence showed that on the day in question, appellant was caring for four children in her home–her two sons, a seven-month-old child, and four-month-old DS. DS's father dropped DS off that morning on his way to work. DS was a healthy and alert infant at that time. Appellant was the sole care giver that day. DS's mother arrived that afternoon at approximately 5:00 p.m., saw DS in the infant swing with his head slumped over, and became concerned. Appellant told the mother that DS had gone to sleep around 4:15 p.m. and did not want to be removed from the swing. Thereupon, appellant picked DS up out of the swing and handed him to his mother, but he was limp and unresponsive. The mother asked if anything unusual had happened that day, and appellant said nothing except that he was fussy on and off. The mother knew something was wrong. Appellant tried a few times to insert DS's pacifier in his mouth, and although it fell out repeatedly, appellant told the mother "see, he's taking his [pacifier]." The mother said he was not and told appellant to

stop. The mother left with DS and drove home, but shortly thereafter, she and DS's father took him to the emergency room because DS was not waking. Tests confirmed that DS was in very poor condition, and he needed to be transported to Arkansas Children's Hospital for intensive care.

Appellant called twice to the hospital in northwest Arkansas to determine how DS was doing. When the mother asked what appellant had done to her baby, appellant replied, "nothing happened to your baby."

DS was placed on life support, but it became clear DS was brain dead. Physicians at Children's testified that they found evidence of subdural hemorrhaging (bleeding around the brain) and massive cerebral edema (brain swelling), as well as extensive bilateral retinal hemorrhages (bleeding in both eyes). The four treating and consulting physicians agreed that this kind of retinal hemorrhaging occurs almost exclusively in babies who have been shaken. The admitting pediatrician opined that DS's injuries were intentionally inflicted by violent shaking or severe impact. The pediatrician explained the force necessary as that consistent with a high-speed automobile accident. The pediatrician stated that it was the extreme back-and-forth movement of the child's head that caused the brain to impact with the interior of his skull. Based on the history of illness, he opined that the injuries were inflicted on the day that DS was in appellant's care, most likely that afternoon. A pediatric ophthalmologist opined that the severity of the eye bleeding indicated that if it was caused by shaking, then the shaking was most likely repetitive and severe. The physicians were in agreement that

these injuries were not the result of an accident but rather resulted from an intentional act. The medical examiner, after autopsy on DS, determined that DS's death was a homicide.

Intent can be inferred from the nature and extent of injuries. *Harshaw v. State*, 348 Ark. 62, 71 S.W.3d 548 (2002). Further, a jury need not lay aside its common sense in evaluating the ordinary affairs of life. *See Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997); *Davis v. State*, 325 Ark. 96, 925 S.W.2d 768 (1996). It was up to the jury to determine the reasonable inferences to be drawn from the State's proof. The jury was instructed to find whether appellant knowingly, recklessly, or negligently caused DS's fatal injuries. The jury found her to have knowingly done so. Given the jury's exclusive function of determining the credibility and weight to be given to the State's proof, we cannot conclude as a matter of law that it was left to speculation and conjecture based upon the type and severity of the injuries sustained by four-month-old DS in her care. Therefore, we affirm this point.

The second point on appeal concerns an evidentiary ruling. The circuit court has wide discretion in making evidentiary rulings, and we will not reverse its ruling on the admissibility of evidence absent an abuse of discretion. *See Brunson v. State*, 368 Ark. 313, __ S.W.3d __ (2006). Appellant moved in limine to prevent the State from (1) having its expert witnesses refer to "shaken baby syndrome" by this term or similar terms, as inherently prejudicial, and further (2) having its experts opine regarding this syndrome because it was not scientifically sound. The trial court disagreed, finding that the *Daubert* analysis was not applicable to this long-standing medical diagnosis. Appellant appeals those rulings.

Appellant articulates her argument as questioning the propriety of naming the constellation of injuries as a reliable specific diagnosis, and questioning the prejudice resulting from the use of inherently prejudicial terms such as "shaken baby syndrome," or similar terms. The argument at trial and on appeal is more keenly focused on the use of the terms "shaken baby syndrome" because of the inflammatory nature of the words.

In *Farm Bureau Mutual Insurance Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), the Arkansas Supreme Court adopted the holding of the United States Supreme Court in *Daubert* and the inquiry to be conducted by a trial court. When presented with a proffer of expert scientific evidence, the trial court must initially perform a gatekeeping function in order to determine if the reasoning behind the evidence is scientifically valid and can be applied to the facts of the case. The supreme court set forth criteria to be used by the judge in making that decision – whether the theory can be tested, whether the theory has been subjected to peer review and publication, whether there were standards maintained controlling the tests or operation, and whether the theories have been generally accepted in the scientific community. However, not all expert testimony is subject to the *Daubert* analysis. The inquiry to be made by the trial court is a flexible one, not a rigid one. *Daubert*, 509 U.S. at 594-95. Further, the *Daubert* factors neither necessarily nor exclusively apply to all experts or in every case. *See generally Turbyfill v. State*, 92 Ark. App. 145, 211 S.W.3d 557 (2005).

Appellant's argument does not concern the experts in the case giving their medical opinion about the exact nature of the injuries, or the cause of death. The quarrel she has is

that the name connotes a specific negative event. Appellant's counsel did not dispute that the terminology was relevant; she argued it was unfairly prejudicial. We cannot agree.

The trial court is given wide discretion in evidentiary rulings. The evidence was that DS died from injuries sustained in appellant's care. Appellant denied that anything unusual occurred that day while DS was in her care. The medical evidence showed devastating injury to this child, resulting in unconsciousness and ultimate death. We cannot determine that appellant was unfairly prejudiced by use of this common medical term during trial. We affirm this discretionary ruling.

Appellant's third point on appeal concerns the admission into evidence of a videotape presentation, purportedly depicting the mechanics of shaking an infant and the resulting typical injuries that are sustained. This tape was not intended to be a portrayal of what occurred at the daycare as a re-enactment, but solely to assist the jury in understanding a doctor's testimony. The jury was so instructed. This evidence was allowed over appellant's objection.

The State contends that this issue is not preserved for our review because appellant failed to ensure that the demonstrative evidence was made part of the record on appeal. It is the appellant's duty to bring up a record sufficient to demonstrate error. *Cox v. State*, 299 Ark. 312, 772 S.W.2d 336 (1989); *Jones v. State*, 45 Ark. App. 28, 871 S.W.2d 403 (1994); *Kellogg v. State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992). Without knowing precisely what the tape, or slides, actually depicted, we are in no position to assess the merits of

appellant's claim. Therefore, we reject this argument because we cannot determine whether there was an abuse of discretion.

We affirm appellant's conviction.

GRIFFEN and MARSHALL, JJ., agree.